

find the facts in the *AT&T* case distinguishable from the facts in this case and urge the ALJ not to reconsider the burden of proof issue.

The ALJ finds that the issues in this proceeding are different than the issues presented in the *AT&T* case; therefore, the ALJ will not reconsider the burden of proof issue. The Court in the *AT&T* case held that “[t]he burden of proving unlawful discrimination, resulting from tariff classifications of customers and services, rests upon the party asserting the claim.” *Id.* at 214. The *AT&T* case involved a determination of which tariff applied as opposed to compliance with a tariff as is the situation in this proceeding. Moreover, the Court in the *AT&T* case states that the burden of proof as to rates and services rests with the utility, which more accurately reflects the facts of this case because a GTE-SW rate/tariff and compliance with that tariff have been questioned. *Id.* at 213. Finally, the *AT&T* case relies on *Ford v. Rio Grande Valley Gas Co.*, 141 Tex. 525, 174 S.W.2d 479, 480 (1943) for the proposition that the burden of proving discrimination is on the party asserting the claim. *Id.* at 214. This general statement of law discussed in a footnote from a 1943 case, which appears to be dicta, cannot be considered sound, reliable precedent, given the express language of PURA 95 § 3.204 and the many telephone cases that have interpreted that statute as assigning the burden of proof to the utility.

B. Intellicall Decision on Burden Proof

To explain the Commission’s policy on burden of proof, it is necessary to begin with the Commission’s decision in *Intellicall, Inc. Et al. Against Private Coin Phone Rates and Practices of Southwestern Bell Telephone Company*, Docket Nos. 7122, 7123, 7124, and 7152, Examiner’s Order No. 6, 12 P.U.C. BULL. 1585 (Dec. 9, 1986), affirmed and reversed in part, 12 P.U.C. BULL. 1627 (Feb. 12, 1987) (*Intellicall*). At the time *Intellicall* was decided, PURA § 40 (now codified at PURA 95 §3.204) read as follows:

In any proceeding involving any proposed change of rates, the burden of proof to show that the proposed change, if proposed by the utility, or the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be on the public utility.

In that decision, the Examiner concluded that the complainant had the burden of proof. The Examiner stated that:

In sum, PURA §40 operates only when there is a rate case--which involves a review of costs and/or a change in allowed revenues--and it allocates both the burden of persuasion and production to the utility either when the utility requests an increase in revenues or when some other party requests a decrease in revenues. In all other cases, including complaint cases, that deal with tariffed rates or Commission rules or utility practices or whatever, the common law rules apply: the burden of persuasion and the initial burden of production fall on the party seeking to change the status quo, unless there is a countervailing issue, such as one party having peculiar knowledge of the operative facts, that justifies an exception to the general rule.³

The decision in *Intellicall* was based on a narrow definition of "rate" as used in PURA § 40. The Commission determined that the term rate referred to the utility's overall revenue and did not have the broader definition found in PURA § 3(d) (currently PURA 95 § 1.003(14)), which includes rules, regulations, practices, etc. Therefore, the Commission concluded the utility would bear the burden in a proceeding challenging its overall revenue requirement, such as PURA 95 § 3.210 cases (formerly PURA § 42) and § 3.211 cases (formerly PURA § 43), and a complainant would bear the burden in proceedings involving a utility's practices or tariffed rates.

C. Metromedia Decision on Burden of Proof

Shortly after *Intellicall* was decided, the 70th Legislature passed S.B. No. 444. PURA § 40 was amended to read as follows:

³ *Intellicall*, 12 P.U.C. BULL. at 1611.

Except as hereafter provided, in any proceeding involving any proposed change of rates, the burden of proof to show that the proposed change, if proposed by the utility, or the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be on the public utility. *In any proceeding involving a local exchange company in which the local exchange company's rate or rates are in issue, the burden of proof that such rates or rates are just and reasonable shall be on the local exchange company.* (Emphasis Added)

The amendment to PURA § 40 persuaded the ALJ in *Complaint of Metromedia Communications Corporation Against GTE Southwest, Inc.*, Docket No. 10503, Examiner's Order No. 3, 17 P.U.C. BULL. 3513 (Nov. 19, 1991)(*Metromedia*), to reverse the ruling in *Intellicall*. In *Metromedia*, the ALJ adopted the broad definition of "rate" as used in PURA § 3(d), which defined rate as:

"Rate" means and includes every compensation, tariff, charge, fare, toll, rental, and classification, or any of them demanded, observed, charged, or collected whether directly or indirectly by any public utility for any service, product, or commodity described in the definition of "utility" in Section 2.001 or 3.001 of this Act and any rules, regulations, practices, or contracts affecting any compensation, tariff, charge, fare, toll, rental, or classification.

Based on the changes to PURA § 40, the ALJ concluded that:

The Legislature did not amend § 40 to preserve the status quo. Effective September 1, 1987, the burden of production and the burden of persuasion was placed on the local exchange company in any proceeding before the Commission where the rules, regulations, practices, or contracts affecting any compensation, tariff, charge, fare, toll, rental, or classification charged by the local exchange company are in issue.⁴

D. Commission's Current Policy Regarding Burden of Proof in Telephone Cases

The Commission continues to follow the *Metromedia* decision. In *Complaint of Sunmeadow Community Improvement Association of Friendswood, Texas Against Southwestern Bell Telephone*

⁴ *Metromedia*, 17 P.U.C. BULL. at 3521.

Company, Docket No. 11253, 18 P.U.C. BULL. 1495, 1500-1501 (Feb. 26, 1993) (*Sunmeadow*), the Commission placed the burden of proof on Southwestern Bell Telephone Company (SWB) in a boundary change that involved a change of rates for a limited number of customers. In *Request of Southwestern Bell Telephone Company to Obsolete and Grandfather Centrex Services and Joint Application of the Parties to Determine if the Restrictions, Terms, and Conditions Associated with the Sharing of Centrex and Plexar Services are Unreasonable as a Matter of Regulatory Policy or in Violation of the Law*, Docket No. 11109, 20 P.U.C. BULL. 109, 236 (Apr. 14, 1994) (*Centrex*), the Commission held that *Intellicall* had been overruled by *Metromedia* as follows:

4. In accordance with § 40 of PURA, SWB carries the burden of proof on all issues in this case and must show that all tariffs challenged in this case are just and reasonable.

5. The burden of production and the burden of persuasion should fall on SWB in any proceeding before the Commission where the Company's rules, regulations, practices, or contracts affecting any compensation, tariff, charge, fare, toll, rental, or classification charged by SWB are in issue.⁵

E. Parties' Positions on Burden of Proof

GTE-SW argues that the location of the demarcation point does not affect any compensation, tariff, charge, fare, toll, rental, or classification charged by GTE-SW; therefore, it falls outside the scope of *Metromedia*, which would place the burden of persuasion and production on the Complainants. In the alternative, GTE-SW argues that the location of a demarcation point has no effect on any rate charged to any customer under PURA 95 § 1.003(14); therefore, the holding in the *Metromedia* case would not apply.

The General Counsel and the Complainants both argue that the term "rate" as used in PURA 95 § 3.204 encompasses tariff provisions and utility practices. Therefore, both parties assert that the burden of proof is on GTE-SW to show that its current practice of locating the demarcation

⁵ *Centrex*, 20 P.U.C. BULL. at 236.

point is authorized by its tariff and internal guidelines; that the practice is not in violation of its tariff or internal guidelines; and that the application of its tariff and internal guidelines is reasonable, nondiscriminatory, and not anti-competitive.

F. ALJ's Recommendation on Burden of Proof

The ALJ finds that the *Metromedia* holding and its interpretation of PURA 95 § 3.204 applies to this case. The term "rate" as defined in PURA 95 § 1.003(14) includes tariff and practices (which in this case are the internal guidelines), so GTE-SW's argument that *Metromedia* was not intended to apply to this proceeding is without merit. Neither PURA 95 nor Commission precedent has changed since *Metromedia* was decided. In fact, the Commission has repeatedly endorsed the *Metromedia* decision.⁶ Once the Complainants provide GTE-SW with sufficient information of the Complainant's cause of action, then GTE-SW assumes the burden of proof.⁷ In this case, the complaint alleges that GTE-SW has failed to follow its tariff and internal demarcation guidelines, has discriminated in the application of its tariff and its internal guidelines, and is in violation of PURA 95 and FCC Rules. GTE-SW, therefore, has the burden to show what its tariff and internal guidelines provide, that its tariff and internal guidelines are in compliance with PURA 95 and FCC Rules, and that it applies its tariff and internal guidelines in compliance with PURA 95 and FCC Rules.

In this case, the ALJ finds that GTE-SW has not satisfied its burden of proof. More specifically, GTE-SW did not demonstrate that it provisions its current STS tariff or internal guidelines in a nondiscriminatory and reasonable manner as required the FCC Rule 68.3(b)(2) and PURA 95 §§ 3.215 and 3.217, which requires the demarcation practice be reasonable and nondiscriminatory. Furthermore, GTE-SW failed to show that its current STS tariff adequately addresses its demarcation tariff. To remedy this, the ALJ has recommended that GTE-SW amend its tariff to detail its demarcation practice in a nondiscriminatory and reasonable manner.

⁶ See *Sunmeadow*, 18 P.U.C. BULL. at 1500-1501; and *Centrex*, 20 P.U.C. BULL. at 236.

⁷ See *Complaint of Kenneth D. Williams Against Houston Lighting and Power Company*, Docket No. 12065, Examiner's Order No. 2 and Order on Appeal, 19 P.U.C. BULL. 884 (Aug. 12, 1993, and Oct. 1, 1993).

VI. SUMMARY OF FACTS

GTE-SW's STS tariff was approved by the Commission on March 10, 1986. In 1990, the FCC issued an Order in CC Docket No. 88-57, which established guidelines outlining general practices and procedures to be followed for the location and relocation of the demarcation point. GTE-SW has not filed tariff amendments with the PUC to redefine the location of the demarcation point on a customer's premises subsequent to the FCC's Order in CC Docket No. 88-57. The Company has, however, modified its internal demarcation guidelines, GTEP 610-148-010, which contain specific terms and conditions for placing demarcation points.

GTE Telephone Operations has internal demarcation guidelines (GTEP 610-148-010), which apply to all GTE operating companies nationwide--including GTE-SW. Section 2.1 of the guidelines states that "all elements of this practice must be adopted and implemented by all operating regions and divisions, for all classes of network services, except for those locations where other simple wiring applications have been mandated through individual state regulatory commission/agency rulings." GTE California, GTE Northwest and GTE-SW are subject to GTE Telephone Operations policies in GTEP 610-148-010, and in both California and Washington, GTE subsidiaries have previously relocated demarcation points to a single MPOE.

In newly constructed multi-unit buildings where it has not already installed inter-building cable, the policy established under the guidelines is to place a single demarcation point at the MPOE at the owner's or her agent's request. GTE-SW also has a written policy on the location of the demarcation point in existing multi-unit locations, but it does not have a written policy regarding relocating multiple demarcation points to a single demarcation that would require the use, purchase, or lease of its existing network cable. The Company does, however, provide examples of similar situations in the GTEP at Section 3.3.2 and 3.3.3. GTE-SW has addressed this scenario in a field guide written prior to the adoption of GTEP 610-148-010, specifically to assist outside plant work force with implementation of FCC guidelines. The field guide does not conflict with the GTEP, stating that even if the point of demarcation has been previously established, a customer may request

rearrangement or an alternate location for the point of demarcation, but that the cost of any alteration or modification to the point of demarcation will be borne by the customer and continue to be placed at the MPOE.

Five apartment buildings are the subject of this complaint: (1) Anchorage Apartments in League City, Texas; (2) Deer Run in Dallas, Texas; (3) Crow's Nest Apartment in League City, Texas; (4) Bridgeport Apartments in Irving, Texas; and (5) Signature Point Apartments in League City, Texas. GTE-SW has multiple demarcation points for these apartment complexes which are located at the MPOE where GTE-SW's network cable enters each building and not a single point of entry or a point at or near the property line.

In 1993, MTS asked GTE-SW to sell the inter-building cable in the Deer Run Apartments, offering to pay GTE-SW the costs of relocating the demarcation points. GTE-SW began negotiating to establish a mutually agreeable demarcation point, indicating that it would consider selling the inter-building cable to MTS. In late 1994, GTE-SW and MTS agreed on an appropriate site for placement of the demarcation point at the MPOE at the Deer Run Apartments, but by January 1995, GTE-SW notified MTS that it would not be relocating the demarcation points and it would not be selling the inter-building cable in the Deer Run Apartments to MTS.

In early 1994, ResCom asked GTE-SW to relocate the multiple demarcation points at certain apartment complexes to a single MPOE in a switchroom, which would enable ResCom to jointly use, lease or purchase GTE-SW's previously installed network cable. ResCom also offered to pay GTE-SW for the cost of relocating the demarcation points. Concerning the Palms at South Shore Apartments (Palms) in League City, Texas, GTE-SW and ResCom negotiated a mutually agreeable demarcation point and agreed that GTE-SW would sell its inter-building cable to ResCom at its depreciated value.

Subsequent to the Palms agreement, ResCom began negotiating the relocation of the demarcation points for the Bridgeport Apartments (Bridgeport) in Irving, Texas. ResCom installed

a PBX at the Bridgeport complex, anticipating its purchase of the inter-building cable from GTE-SW. Approximately two weeks before the service was to be cut over at Bridgeport, GTE-SW informed ResCom that it would not be relocating the demarcation points or selling the inter-building cable to ResCom; that GTE-SW had reorganized in early December 1994 and reevaluated its position on the relocation of demarcation points and sale of cable; and that the GTE-SW employee who had been negotiating with ResCom would no longer be handling demarcation placement and cable sales for the Company.

Although GTE Telephone Operations developed the internal demarcation guidelines to be followed by all its regional operation companies upon implementation of the Order in CC Docket 88-57, GTE-SW management established a policy in December 1994 of not relocating multiple demarcation points to a single demarcation point at the request of STS providers whose sole purpose was to use, purchase or lease GTE-SW's previously installed cable, and the Company has not amended its STS tariff to reflect the policies and practices regarding the relocation of demarcation points to a single point for use, sale or lease to STS providers. Technical reasons or concerns for risk or harm to the public network if customers are allowed to access embedded wire is not a factor in GTE-SW's refusal to relocate the demarcation points as requested by MTS and ResCom. Neither GTE-SW's written demarcation practice nor its STS tariff specifically addresses whether GTE-SW will sell its installed network wiring at apartment complexes.

Complainants filed this formal complaint on May 30, 1995. The Complainants are not seeking an additional demarcation point from which to build their own network cable. Complainants wish, however, to use, purchase, or lease GTE-SW's existing cable network, and they are willing to bear the costs of relocating the demarcation points. Complainants allege that GTE-SW, by refusing to relocate the demarcation point, is applying its demarcation practices unreasonably and in an anti-competitive manner.

VII. FCC ORDER IN CC DOCKET 88-57

A. Overview of FCC's Order in CC Docket No. 88-57

CC Docket No. 88-57 provides:

- (a) That the point of demarcation between the telephone company network and the customer premises wiring begins at the minimum point of entry in a single customer premises;
- (b) The owner of the building (or installation) with multiple customers may designate whether to maintain multiple demarcation points at each customer premises or to establish one demarcation point at the minimum point of entry to the building (or installation);
- (c) That customers may connect simple inside wire to existing wire on the customer's/building owner's side of the demarcation point;
- (d) That the telephone company may disconnect service when harm occurs to the network as a result of customer-installed cable and equipment;
- (e) That certain requirements for acceptance testing be eliminated and provide jack and plug requirements; and
- (f) That the telephone companies are encouraged to develop and distribute an informational brochure on the rights of subscribers to perform inside wire operations.

Docket No. 10831, 20 P.U.C. BULL. at 1026.

B. GTE-SW's Position

GTE-SW contends that the FCC Order in CC Docket No. 88-57 allows end users to make choices in the purchase of inside wiring. According to GTE-SW, it had nothing to do with enhancing competition between local carriers and STS providers. GTE-SW contends that complainants reliance

on Docket No. 88-57 is misplaced. It claims that the FCC discussed competition in the sale of inside wiring, but did not address the issue of competition between local carries and alternate service providers.

C. Complainants' Position

The Complainants interpret the FCC's Order in CC Docket No. 88-57 as allowing flexibility in establishing demarcation points. The FCC stated that "[t]he revised definition of the demarcation point for existing multi-tenant situations does not preclude relocation of the demarcation point at the request of the premises owner to the minimum point of entry." CC Docket No. 88-57, 5 FCC Rcd. at 4693, fn. 27. Complainants believe the FCC's intent in CC Docket No. 88-57 can be best summarized as follows:

Depending on the service configurations, state requirements and carrier practices, the multiunit property owner may not be the customer of the telephone service, i.e., the unit property owner may be the customer.... In other words, in most cases it will be the multiunit property owner's ability to select the configuration of demarcation points that is the necessary precondition for increasing the customer's ability in a multiunit situation to perform inside wiring operations. Therefore, allowing the multiunit property owner to select the service configuration of the multi-unit property will promote the customer's ability to perform inside wiring operations even if the multiunit property is not a customer.

5 FCC Rcd. at 4693, fn. 31.

Complainants assert that the FCC expects the local carrier to relocate the demarcation point if a customer can demonstrate that the relocation will improve the ability to satisfy its changing communications needs, without impairing other customers' services.

D. General Counsel's Position

General Counsel agrees with the Complainants that the FCC, through its guidelines issued in CC Docket No. 88-57, sought to expand the ability of customers to have greater control over access to inside wire and cable facilities on their premises and to facilitate competition in the provisioning of inside wire. CC Docket No. 88-57, 5 F.C.C. Rcd at 4687. According to General Counsel, the Order in CC Docket No. 88-57 allows the customer the ability to connect simple inside wire up to and including the demarcation point, revises the demarcation point definition, authorizes disconnection by the telephone company when trouble occurs as the result of customer installed equipment, deletes certain requirements regarding acceptance testing, provides for jack and plug requirements, and encourages development and distribution of information packets describing inside wire functions. Moreover, the FCC Order in CC Docket No. 88-57 defines demarcation point and explains the placement of the demarcation under various circumstances as well as describing the MPOE.

E. ALJ's Recommendation

The ALJ agrees with the Complainants and General Counsel that the Order in CC Docket No. 88-57 emphasizes flexibility and permits the relocation of the demarcation points. The FCC's intent in CC Docket No. 88-57 was to expand the customer's control over access to inside wiring and cable facilities. Additionally, the FCC intended for the local carriers to specifically define their demarcation practice, which should account for relocating multiple demarcation points to a single demarcation point at the MPOE. Although GTE-SW has internal guidelines, these guidelines do not sufficiently address relocating multiple demarcation points. Clearly, the Order in CC Docket 88-57 permits relocating of multiple demarcation points to a single demarcation point as a standard operating practice. SWB, in response to CC Docket 88-57, amended its tariff to allow for relocating multiple demarcation points to a single demarcation point at the MPOE. Accordingly, the ALJ recommends that GTE-SW amend its STS tariff to address collapsing multiple demarcation points to a single

demarcation point at the MPOE in accordance with the FCC's Order in 88-57 and the increased competition in the telecommunications industry.

VIII. THE APPLICABILITY OF PURA 95 TO DEMARCATION POINTS AND OTHER ISSUES IN THIS PROCEEDING

A. Overview of PURA 95 and its Impact on this Complaint

Neither PURA 95 nor the Commission's Rules directly address the demarcation issue. However, General Counsel and Complainants argue that many sections of PURA 95 impact this proceeding. GTE-SW does not believe that PURA 95 impacts this proceeding.

B. GTE-SW's Position

GTE-SW advocates that neither PURA 95 nor the Commission's Rules address the issue regarding the proper location of demarcation points. Furthermore, it claims that the Complainants have not alleged that the tariff is unreasonable or discriminatory, but rather it is the manner in which it has been applied that is unreasonable and discriminatory.

GTE-SW contends that the Complainants have failed to state a claim for which relief can be granted under P.U.C. PROC. R. 22.181(a)(1)(G).

Finally, GTE-SW argues that the Complainants are equitably estopped from demanding that GTE-SW relocate its demarcation points. GTE-SW asserts that it materially altered its position at the request of the property owners by incurring costs for installing the network cable and by placing the demarcation point where the network wiring attaches to each building of the complexes involved in this proceeding. The evidence shows that the owners of the apartment complexes in question requested that GTE-SW install the network cable that currently exists on the properties. The original property owners or construction company subcontractors determined where the electrical wires would exit each building at a common exit point and where the grounding wires would be located.

The total original cost GTE-SW incurred to install its network cable at the apartment complexes in question was \$158,117.00. Att. A at 2, Nos. 10-11. Moreover, GTE-SW argues that the property owners benefitted from the laying of GTE-SW's cable in its current location at the time of construction.

C. Complainants' Position

Complainants assert that GTE-SW cannot rely on its internal guidelines to override its STS tariff, and to the extent that GTE-SW relies on its internal guidelines, GTEP 610-148-010, as its standard practice, Complainants contend that this practice constitutes a "rate", which GTE-SW is required to file with the Commission pursuant to PURA 95 § 3.154(a).

The term rate is defined in PURA 95 § 1.003(14) as follows:

'Rate' means and includes every compensation, tariff, charge, fare, toll, rental, classification, or any of them demanded, observed, charged, or collected whether directly or indirectly by any public utility for any service, product, or commodity described in the definition of 'utility' in Section 2.001 or 3.002 of this Act and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

Because GTE-SW's internal guidelines are "rates," Complainants argue that GTE-SW is in violation of PURA 95 § 3.154(a) because it has not filed GTEP 610-148-010 with the Commission. PURA 95 § 3.154(a) states that "[e]very utility shall file with the commission schedules showing all rates which are the subject to the jurisdiction of the commission and which are in force at the time for any utility service, product, or commodity offered by the utility." PURA 95 § 3.154(b) further states that "[e]very public utility shall file with and as part of such schedules all rules and regulations relating to or affecting the rates, utility service, product, or commodity furnished by such a utility." Complainants argue that subsection (b) requires that GTE-SW receive Commission approval of its demarcation practice even if determined not to be a rate under PURA 95 § 1.003(14).

- By not filing the demarcation practices with the Commission, the Complainants argue that this allows GTE-SW to discriminate among customers and competitors in violation of PURA 95 § 3.215 and § 3.217. As both a competitor and customer of GTE-SW, Complainants believe that they are susceptible to discrimination by GTE-SW. For example, GTE-SW has allowed for the resale of its cable at the Palms of South Shore and was, at one time, willing to do so at Bridgeport Apartments. Att. A at 8, No. 46 and 47. These actions are inconsistent with GTE-SW's current position in this docket according to Complainants.

Complainants also argue that GTE-SW applies its internal guidelines inconsistently with other GTE operating companies. The evidence shows that GTE Telephone Operation guidelines are intended to apply to all GTE operating companies nationwide. Att. A at 14, No. 87. In California and Washington, GTE subsidiaries have previously relocated demarcation points to a single MPOE. Att. A at 15, No. 88. Complainants believe that this further exemplifies the discrimination by GTE-SW in this case.

Finally, Complainants contend that GTE-SW's refusal to relocate the demarcation point harms the general public because it limits the end users' choice of carriers, especially those residents living in older complexes.

D. General Counsel's Position

General Counsel avers that the Commission has the authority to determine whether rates are unreasonable, to prevent prejudice or unfair advantage, and to prevent the restriction of competition. PURA 95 §§ 3.202 and 3.217. General Counsel agrees with Complainants that the definition of rate under PURA 95 § 1.003(14) is broad enough to include the utility's tariffs and practices. Furthermore, according to General Counsel, the Commission has broad authority and must determine if the practices and procedures of GTE-SW have been implemented in a preferential, discriminatory, or anti-competitive manner. General Counsel contends that GTE-SW's practice regarding location of the demarcation point is unreasonable and in violation of PURA 95 § 3.215 and § 3.217, and

because of these violations, the Commission has authority to grant the relief requested pursuant to PURA 95 §§ 3.155, 3.201, and 3.210, which require the Commission to determine if a utility's tariffs are reasonable and to insure that the practices of a utility are not discriminatory or anti-competitive. Despite its tariff, GTE-SW relies on internal policies and guidelines to dictate the practice of locating demarcation points, which the General Counsel believes subjects premises owners to unreasonable prejudice and disadvantage. To eliminate this problem, General Counsel recommends that GTE-SW file a reasonable and non-discriminatory tariff establishing a practice for locating and relocating the demarcation point.

E. ALJ's Recommendation

1. Waiver and Equitable Estoppel

GTE-SW argues that the Complainants have failed to state a claim for which relief can be granted and that the Complainants are equitably estopped from pursuing this complaint. The ALJ finds that the Complainants have not waived their right to bring this complaint. For GTE-SW to argue that the Complainants have waived their right to request that the demarcation points be relocated is disingenuous, given that GTE-SW has on other occasions relocated demarcation points. Furthermore, nothing in GTE-SW's current tariff or its internal guidelines prohibit relocation. In fact, the internal guidelines expressly provide that the demarcation points can be relocated at the request of the property owner.

To prove equitable estoppel, GTE-SW must demonstrate that it would be harmed by and the Complainants would benefit from the relocation. GTE-SW has failed to show how it would be harmed by relocating the demarcation point or how the Complainants would benefit. Because the issue of relocation is one of first impression regarding GTE-SW, and it has never before been addressed in GTE-SW's tariff, internal guidelines, or any proceeding at the PUC involving GTE-SW, the ALJ is not persuaded by GTE-SW's assertion that the Complainants are estopped from raising this issue. Moreover, the ALJ finds that GTE-SW will not be harmed because Complainants will pay

GTE-SW any necessary rearrangement fee necessary to relocate the demarcation points, and GTE-SW will continue to earn a return on and depreciate the unrecovered portion of its investment associated with the cable facilities.

2. The Commission's Broad Authority over this Complaint

The ALJ agrees with GTE-SW that PURA 95 and the Commission's Rules do not directly address the location of demarcation points; however, the broad authority given to the Commission throughout PURA 95 allows for the regulation of GTE-SW and its practices, especially if there are allegations of discriminatory, unreasonable, and anti-competitive behavior. For GTE-SW to suggest that the Commission does not have authority to regulate the business practices of a utility is without merit. The Commission is given broad authority to regulate and supervise the business of every public utility in Texas. PURA 95 § 1.101; *See Public Utility v. Allcomm Long Distance*, 902 S.W.2d 662, 667 (Tex. App.--Austin 1995, writ denied). The Commission also has authority to determine if a public utility discriminates between customers regarding any service and to determine if a public utility is engaging in a practice that impairs competition, and it has authority to remedy any conduct it found to be unreasonable, discriminatory, or anti-competitive. *See* PURA 95 §§ 3.215, 3.217, 3.155, 3.201, and 3.210.

3. The Commission's Duty to Ensure Compliance with PURA 95

Although GTE-SW's STS tariff has been approved by the Commission, this does not prevent a party from challenging that tariff 10 years later based on events that occurred subsequent to the Commission approval. The Commission has the continuing duty to ensure that every public utility in Texas complies with its tariff and to ensure that the utility applies that tariff in a non-discriminatory manner. PURA 95 § 3.215 GTE-SW's tariff was approved in 1986 prior to the issuance of the FCC's Order in CC Docket No. 88-57. GTE-SW has failed to amend its tariff to comply with the FCC's Order. Additionally, since 1986, the telecommunications industry has witnessed significant

changes, including increased competition. The focus on competition has to be considered by the Commission in reviewing GTE-SW's practices. PURA 95 § 3.217.

4. The Definition of Rate under PURA 95 Includes GTE-SW's Demarcation Practice

The ALJ also is persuaded by the arguments of Complainants and the General Counsel that GTE-SW's demarcation practice would be included in the broad definition of rate as defined in PURA 95 § 1.003(14), which encompasses any regulations or practices of the utility. *See* PURA 95 § 1.003(14). Because GTE-SW's demarcation practice would be considered a rate, GTE-SW is obligated to file all schedules showing all rates and is further required to file as part of those schedules all rules and regulations affecting those rates. *See* PURA 95 § 3.154(a) and (b).

IX. GTE-SW'S SHARED TENANT SERVICE TARIFF

A. Overview of GTE-SW's STS Tariff

GTE-SW's Texas General Exchange Tariff, Section 44, 2nd Revised Sheet No. 5 (GTE-SW's STS Tariff) tariff requires it to terminate its network access facilities at a mutually agreeable point of demarcation and requires that it establish the demarcation point in accordance with FCC Rules and Regulations. GTE-SW's STS Tariff states:

The Telephone Company shall terminate its Network Access Facilities at a mutually agreeable point of demarcation. The point of demarcation is the point of interconnection of the local exchange company with the facilities and terminal equipment of the STS provider, in a manner no different than provided under Part 68 of the FCC Rules and Regulations.

The Commission approved the tariff in *Application of General Telephone Company of the Southwest for a Tariff Change to Provide for Tenant Resale Service*, Docket No. 6076, 11 P.U.C. BULL. 891 (Jan. 24, 1986)(Docket No. 6076). The Complainants and GTE-SW agree that the

phrase "mutually agreeable" should be given its ordinary meaning, which is that both parties to the transaction should be satisfied with the transaction. Att. A at 5, No. 24.

B. GTE-SW's Position

According to GTE-SW, none of the parties to Docket No. 6076, which included STS providers, challenged the language of the tariff as ambiguous, unreasonable, preferential, discriminatory, or prejudicial. GTE-SW claims that the tariff language is clear and unambiguous. GTE-SW recognizes that the tariff does not address a situation where the demarcation points have already been determined at the time of construction, and years later an STS provider decides that the demarcation points should be moved. GTE-SW claims that the STS providers requested the relocation of the demarcation points solely for monetary gain. GTE-SW also states that there is nothing in its tariff that allows an STS provider access to GTE-SW's network cable. In fact, according to GTE-SW, the tariff requires that the STS providers allow GTE-SW to use any wire and cable the STS providers install to provide telephone service to end users. *See* STS Tariff, Section 44, 1st Revised Sheet No. 4. This allows GTE-SW the ability to provide service to any end user who requests it. *See* Docket No. 6076, 11 P.U.C. BULL. at 904.

C. Complainants' Position

Complainants assert that the tariff language gives the property owners or their agents the right to agree on where the single point of demarcation will be located. Complainants contend that the only reason GTE-SW refuses to relocate to a single demarcation point is to impede competition. Therefore, according to the Complainants, GTE-SW's decision to maintain multiple points of demarcation violates the tariff provision that requires mutual agreement for locating the demarcation point and violates Part 68 of the FCC Rules and Regulations, which require that the demarcation point be determined in accordance with the local carrier's standard and nondiscriminatory operating practice.

D. General Counsel's Position

General Counsel contends that GTE-SW's STS tariff does not establish a practice of placing the demarcation point in compliance with the guidelines in CC Docket No. 88-57; therefore, it is obsolete and should be replaced. General Counsel claims that CC Docket No. 88-57 expands the definition of demarcation points, which allows the customer greater access to all carrier-installed wire. CC Docket No. 88-57 authorizes the carrier to establish a reasonable and nondiscriminatory practice of placing the demarcation point at the MPOE on new and existing multi-unit properties. In the absence of such a practice, the owner of the property has the option of determining the location of the demarcation point. Because GTE-SW has not established a practice in compliance with CC Docket No. 88-57 within its tariff, General Counsel believes the Commission should order GTE-SW to adopt provisions in its tariff describing the circumstances under which GTE-SW should relocate its demarcation points.

General Counsel recommends that GTE-SW create within its amended tariff a default demarcation policy that controls when GTE-SW and the premises owners are unable to agree on a location of the demarcation point. General Counsel believes that CC Docket No. 88-57 requires that the customer/owner have the authority to request a move of the demarcation point. Therefore, according to General Counsel, the default policy should require GTE-SW to move the demarcation point to a singular point of demarcation on a single unit premise or at the request of the owner on a multi-unit premise. General Counsel also recommends that reasonable non-recurring charges apply when the owner requests a move of the demarcation point, and the FCC guidelines established in CC Docket No. 88-57 should be adhered to. General Counsel also believes that GTE-SW's tariff should address the terms for the sale of previously installed cable to third parties.

E. ALJ's Recommendation

1. GTE-SW's Compliance with STS Tariff

The ALJ finds that GTE-SW located the demarcation point at a mutually agreeable location at the time the apartments were built and has therefore complied with the first part of its tariff. Att. A at 2, Nos. 9-11. Although the Complainants interpret the current tariff as requiring a mutually agreeable relocation, the tariff simply does not address the issue of relocating the demarcation point from multiple demarcation points to a single demarcation point. The tariff does, however, require compliance with FCC Rules and Regulations. In that regard, the ALJ finds that GTE-SW violated its tariff because it did not comply with FCC Rules and Regulations, which require the local carrier to establish a reasonable and nondiscriminatory demarcation practice. *See* 47 C.F.R. 68.3(b)(2).

2. GTE-SW's STS Tariff Does Not Adequately Inform Customers and Competitors

The problems begin with GTE-SW's failure to modify its STS tariff after the FCC issued its Order in CC Docket No. 88-57, which occurred after GTE-SW's STS tariff was approved by the Commission in 1986. One of the most appropriate reasons for including a demarcation practice in its tariff is to put customers and competitors on notice. Because the STS tariff does not set forth GTE-SW's demarcation practice, the customers and competitors of GTE-SW are not aware of GTE-SW's practice. For GTE-SW to assert that it has an internal demarcation practice, which is not included in its tariff and has not been approved by the Commission, does not resolve the issue of notice to the customers and competitors. An internal policy does not put the public on notice as to GTE-SW's policy. Further, because the internal policy has not been approved by the Commission, GTE-SW has the power to alter its policy without Commission approval or notice. This creates an unfair competitive advantage for GTE-SW.

3. Elimination of Costly Litigation

Moreover, a tariffed demarcation practice could eliminate costly complaint cases such as this docket. By the time the Commission issues a final decision in this case, it will have been almost a year since the formal complaint was filed. It will have been even longer since the controversy first developed. The parties have spent substantial time and resources filing numerous briefs, developing a stipulation of facts, and participating at the hearing on the merits. This does not account for the many hours attempting to reach settlement in this case. Since SWB amended its tariff to redefine the point of demarcation in response to the FCC Order in CC Docket No. 88-57, the ALJ is not aware of a contested complaint case concerning SWB's demarcation practice that has been filed at the Commission. This is in large part because SWB incorporated a lot of detail about its demarcation practice in its tariff. Although revising its tariff may not solve all of GTE-SW's problems regarding location of the demarcation points, it is the necessary first step toward that goal.

4. Lack of Information Provided in GTE-SW's STS Tariff

GTE-SW repeatedly states that nothing in its tariff allows STS providers to use, lease, or purchase GTE-SW's network cable. This statement is true only because GTE-SW's tariff does not provide enough information regarding relocating demarcation points. Although GTE-SW argues that Complainants filed this complaint solely for monetary gain, and the Complainants argue that GTE-SW's motivation for refusing to relocate the demarcation point is to impede competition, the ALJ finds that these arguments cloud the real issue in this case, which is GTE-SW's tariff or lack thereof. Regardless of the parties' motivations in this case, GTE-SW needs to amend its tariff to clearly define its demarcation practice. The current tariff amounts to one paragraph that provides little information and guidance on GTE-SW's demarcation practice. Therefore, the ALJ recommends that GTE-SW file a revised STS tariff defining its demarcation practice within four months of the final Order in this docket.

The Order in CC Docket No. 88-57 allows GTE-SW to establish a reasonable and nondiscriminatory operating practice of placing the demarcation point at the MPOE for multi-unit properties. In the absence of such practice, the multi-unit property owner has the right to determine the location of the demarcation point. Both the General Counsel and the Complainants argue that this practice must be incorporated into GTE-SW's tariff. GTE-SW argues that the FCC did not specifically state that the practice had to be part of the tariff. The ALJ agrees that the FCC did not specifically state that the practice had to be part of the local carrier's tariff, but the ALJ finds that PURA 95 § 3.154 requires GTE-SW to include its demarcation practice within its tariff. The tariff will allow GTE-SW to clearly define its demarcation policy, and it will provide notice to all interested parties.

5. Tariff Revisions

Because this case originated as a complaint, the ALJ does not believe that the notice that was provided was sufficient to allow for tariff changes in this proceeding. *See* Attachment D (notice provided in this proceeding). Due process requires that all interested parties be given the opportunity to intervene and participate in GTE-SW's demarcation/tariff revision case.

Although the ALJ concludes that the tariff changes cannot be made in this docket, the ALJ recommends that the Commission suggest guidelines for GTE-SW's tariff revisions based on its Order in Docket No. 10831. The guidelines from Docket No. 10831 that GTE-SW should consider in developing its tariffed demarcation practice are as follows:

A single demarcation point will be established in an existing multi-unit installation when:

- The installation owner requests a single demarcation point;
- The installation owner or customer attaches to the cable or other facilities on the installation owner's side of the minimum point of entry; or
- The existing facilities to the installation are exhausted or expire, at the election of the installation owner.

A single demarcation point will be established in an existing single-unit installation when:

- The installation owner requests a single demarcation point;
- The installation owner or customer attaches to the cable or other facilities on the building owner's side of the minimum point of entry;
- The existing facilities to the installation are exhausted or expire; or
- GTE-SW determines through regular service order activity or customer premises work that a particular installation constitutes a single-unit installation.

Furthermore, the ALJ recommends that GTE-SW look to the Order in Docket No. 10831 on the issues of "allowed use" and as to the charges for establishing a single demarcation point for single and multi-unit installations. *See* Attachment C (Order In Docket No. 10831). GTE-SW should also consider Staff's recommendations in this case when developing its tariff. *See* Attachment E (Staff recommendations). Finally, the ALJ finds that the evidence in this case is insufficient to recommend tariff changes.

X. FCC RULE--47 C.F.R. § 68.3

A. Overview

Part 68 of the FCC's Rules governs the terms and conditions for connection of customer provided terminal equipment and wiring to the telephone network. CC Docket No. 88-57 reviewed and modified portions of Part 68 relating to connection of simple inside wiring to the telephone network.

GTE-SW's STS tariff requires that the location of the demarcation points be consistent with the pertinent FCC Rules. In September 1992, GTE Telephone Operations adopted Demarcation Guidelines, GTEP 610-148-010, containing specific terms and conditions for placing demarcation points in accordance with CC Docket No. 88-57. GTE-SW has ratified these guidelines for its internal use. The Complainants do not dispute that GTEP 610-148-010 is consistent on the whole with FCC Rules. GTE-SW's demarcation guidelines do not, however, contain a specific written policy regarding whether it will relocate demarcation points for the purpose of allowing use,

purchase, or lease of its existing network cable. GTE-SW did not file tariff revisions following the Order in CC Docket No. 88-57 because it did not believe it was required to do so, and because its current tariff already requires it to comply with FCC Rules and Regulations. Att. A at 5-6, Nos. 27-32.

Because the inside wire at the apartment complexes in question has been rearranged, modified, or added to since it was initially installed, the properties in this complaint are considered post August 13, 1990 properties and are governed by 47 C.F.R. § 68.3(b)(2), which provides:

In multiunit premises in which the wiring is installed after August 13, 1990, including additions, modifications and rearrangements of wiring existing prior to that date, the telephone company may establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points.

B. GTE-SW's Position

Because of this language, GTE-SW asserts that the only event that can trigger the property owner's right to unilaterally determine the location of the demarcation point is if the local telephone company does not establish the demarcation point at the MPOE. Because GTE-SW has already established the demarcation point at the MPOE at the apartment complexes involved in this case, it believes that the property owner does not have the unilateral right to choose the location. Moreover, GTE-SW does not believe that its failure to file its demarcation practice with the Commission triggers the property owners right to decide on the location of the demarcation point.

GTE-SW states that, although its demarcation practice is not filed with the Commission, the property owners still have actual notice of the placement of the demarcation points. In establishing the demarcation points, GTE-SW requires that the original property owners or construction company subcontractors determine where the electrical wires would exit each building at the common exit

point and where the grounding wires will be located. Att. A at 2, No. 10. GTE-SW also contends that all parties are put on notice by its tariff, which states that the demarcation point will be placed in accordance with FCC Rules. Therefore, according to GTE-SW, neither the PUC Staff nor the Complainants can impose additional requirements on GTE-SW that are not specifically required by its tariff.

C. Complainants' Position

The Complainants argue that GTE-SW does not have a demarcation point policy in Texas other than its STS tariff, which requires that the demarcation point be at a mutually agreeable location. GTE-SW, through its General Manager-Network Construction, Ron Knight, established a policy of not relocating multiple demarcation points to a single demarcation point at the request of the STS provider where the sole purpose would be to allow STS providers to use, purchase, or lease GTE-SW's previously installed cable. Joint Ex.1 at 16, No. 93. The Complainants contend that GTE-SW's current practice is unreasonable and anti-competitive. Furthermore, the Complainants assert that GTE-SW's so-called practice is *ad hoc* and applied inconsistently.

Because the properties involved in this dispute are post August 13, 1990 properties, the Complainants argue that the premises owner may choose the location of the demarcation point if GTE-SW has not established a standard practice of placing the demarcation point at the MPOE. Complainants contend that the practice must be part of the local carrier's tariff to meet the FCC's requirement that the local carrier have a standard operating practice. Because GTE-SW has not incorporated its practice as part of its tariff, Complainants assert that they have the right to determine the location of the demarcation point.

Complainants assert GTE-SW's adoption of the demarcation guidelines does not establish a standard practice of placing demarcation points that overrides GTE-SW's approved tariff. First, GTE-SW never filed these internal guidelines with the Commission for approval. Second, the internal guidelines state that they are for use only by GTE-SW employees and approved contractors. When